

Del Bove Barbosa (Migration) [2017] AATA 2349 (15 November 2017)

DECISION RECORD

DIVISION:	Migration & Refugee Division
APPLICANT:	Mrs Carla Del Bove Barbosa
CASE NUMBER:	1714240
DIBP REFERENCE(S):	BCC2016/2531989
MEMBER:	Michelle East
DATE:	15 November 2017
PLACE OF DECISION:	Perth
DECISION:	The Tribunal remits the application for a Partner (Temporary) (Class UK) visa, with the direction that the applicant meets the following criteria for a Subclass 820 (Partner (Temporary)) visa: • cl.820.211(2) of Schedule 2 to the Regulations • cl.820.221 of Schedule 2 to the Regulations

Statement made on 15 November 2017 at 3:30pm

1. **CATCHWORDS**

2. Migration – Partner (Temporary) (Class UK) visa – Subclass 820 (Partner (Temporary)) – Evidence of a spousal relationship – Genuine and continuing spousal relationship

3.

4. **LEGISLATION**

5. *Migration Act 1958* s 5F, 5F(2), 5F(2)(a)-(d), 65, 360(2)(a)

6. *Migration Regulations 1994*, rr. 1.15A, 1.15A(3), Schedule 2 cls. 820.221, 820.211(2), 820.211(2)(a), 820.211(2B)

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

7. This is an application for review of a decision of a delegate of the Minister for Immigration on 16 June 2017 to refuse to grant the applicant a Partner (Temporary) (Class UK) visa under s.65 of the *Migration Act 1958* (the Act).
8. The applicant applied for the visa on 1 August 2016 on the basis of her relationship with her sponsor. At that time, Class UK contained only one subclass: Subclass 820 (Partner (Temporary)). The criteria for the grant of this visa are set out in Part 820 of Schedule 2 to the Migration Regulations 1994 (the Regulations). The primary criteria must be satisfied by at least one applicant. Other members of the family unit, if any, who are applicants for the visa need satisfy only the secondary criteria.
9. The delegate refused to grant the visa on the basis that the visa applicant did not satisfy cl.820.211 because on the limited evidence available the delegate was not satisfied the applicant and her sponsor were in a genuine spousal relationship.
10. In reaching its decision the Tribunal did not consider a hearing to be necessary, as it was able to find in favour of the visa applicant on the basis of the material before it, pursuant to s.360(2)(a) of the Act.
11. The applicant was represented in relation to the review by her registered migration agent who provided detailed and well prepared submissions.
12. For the following reasons, the Tribunal has concluded that the matter should be remitted for reconsideration.

CONSIDERATION OF CLAIMS AND EVIDENCE

13. The issue in the present case is whether the applicant is the spouse of the sponsor within the meaning of s.5F of the Act.

WHETHER THE PARTIES ARE IN A SPOUSE OR DE FACTO RELATIONSHIP

14. Clauses 820.211(2)(a) and 820.221 require that at the time the visa application was made, and at the time of this decision, the applicant is the spouse or de facto partner of an Australian citizen or Australian permanent resident or an eligible New Zealand citizen. In the present case the applicant claims to be the spouse of the sponsor who is an Australian citizen.
15. 'Spouse' is defined in s.5F of the Act and provides that a person is the spouse of another where the two persons are in a married relationship. Persons in a married relationship must be married to each other under a marriage that is valid for the purposes of the Act, there must be a mutual commitment to a shared life as husband and wife to the exclusion of all others, the relationship must be genuine and continuing, and the couple must live together, or not live separately and apart on a permanent basis: s.5F(2)(a)-(d). In forming an opinion about these matters, regard must be had to all of the circumstances of the relationship. This includes evidence of the financial and social aspects and the nature of the parties' household and their commitment to each other as set out in r.1.15A(3), which is extracted in the attachment to this decision.

ARE THE PARTIES VALIDLY MARRIED?

16. If the parties are validly married, they may meet the requirements of a spousal relationship, but not a de facto relationship. The parties have provided the Tribunal with a copy of their Marriage Certificate issued by the Registry of Births, Deaths and Marriages in Western Australia. The parties married on 23 May 2016. On the evidence, the parties were married to each other under a marriage that is valid for the purposes of the Act as required by s.5F(2) (a).

ARE THE OTHER REQUIREMENTS FOR A SPOUSAL RELATIONSHIP MET?

17. The Tribunal has had regard to the evidence provided relating to the financial aspects of the relationship including joint ownership of assets and joint liabilities, the extent of any pooling of financial resources, any legal obligations owed by the other party and any sharing of the day to day household expenses.
18. The parties have provided several bank statements for accounts they hold jointly and individually. These statements have been provided from 2015 to the current time. A review of these statements reflects a sharing of finances between the parties with each being responsible for different expenses. Evidence was also provided of joint personal loans taken out by the parties
19. The applicant initially moved in with the sponsor at a shared rental he was living in. They subsequently moved to live with the sponsor's grandmother and contribute to household bills which are in the grandmother's name.
20. Both parties have sworn statutory declarations detailing how they each contribute financially in the relationship.
21. The sponsor has been nominated as the applicant's beneficiary on her superannuation account.
22. The Tribunal is satisfied based on the documentary evidence provided that they parties pool their resources and share their day to day expenses in such a way that would indicate a genuine and continuing spousal relationship.
23. The Tribunal has had regard to the evidence as to the nature of the household including the parties' living arrangements, the caring of any children and any sharing of housework.
24. The parties' evidence both in submission and statutory declaration form is the applicant initially moved into shared accommodation with the sponsor in February 2015. A statutory declaration has been provided by their house mate at this time corroborating this evidence. In August 2015 the parties moved in with the sponsor's grandmother and continue to live there. Multiple pieces of correspondence have been provided addressed to both the applicant and the sponsor at the grandmother's house. Both parties have provided statutory declarations which outline how their daily lives run and who is responsible for which household duties. A statement from the grandmother has also been provided attesting to the same evidence.
25. On the basis of the documentary evidence provided to the Tribunal it is satisfied that the nature of the household of the applicant and her sponsor is an indicator of a genuine and continuing spousal relationship.
26. The Tribunal has had regard to the evidence provided as to whether the parties represent themselves to other people as being married to each other, the opinion of the parties' friends

and acquaintances about the nature of the relationship and any basis on which the parties plan and undertake joint social activities.

27. Multiple photos have been provided by the parties depicting them in a variety of social situations with different friends and family in both Australia and Brazil. Photos of their Australian civil wedding ceremony were provided as well as evidence of their recent ceremony in Brazil.
28. Statutory declarations have been provided by the sponsor's mother and grandmother and also friends and family of both the applicant and the sponsor. All these attest to their knowledge of and belief in the genuineness of the parties' relationship.
29. The Tribunal is in no doubt that the evidence of the social aspects of the parties' relationship is an indicator of a genuine spousal relationship.
30. The Tribunal has had regard to the evidence provided in relation to the nature of the parties' commitment to one another, including the duration of the relationship, the length of time they have lived together, the degree of companionship and emotional support they draw from each other and whether they see the relationship as long term.
31. The parties have both attested they met in a bar in Scarborough in August 2014. They started dating and in February 2015 the applicant moved in to live with the sponsor. In August 2015 they moved in with the sponsor's grandmother and continue to live there with her. In November 2015 the parties got engaged and in December the parties travelled to Brazil together to meet the applicant's family. On 23 May 2016 the parties had a civil wedding ceremony and celebration attended by approximately 70 people. Just recently, in October 2017, they travelled again to Brazil for a traditional wedding ceremony and celebration.
32. The parties present as a young couple who are actively planning their future together. The documents provided portray a committed couple evidenced by their travel to Brazil to introduce the sponsor to the applicant's family and for their traditional wedding. Multiple statutory declarations were provided by friends and family all which attest to the level of commitment the applicant and the sponsor have towards one another.
33. The Tribunal is satisfied based on all the documentary evidence which was provided to it that the level of emotional commitment and degree of companionship that the parties provide to each other is an indicator of a genuine and continuing spousal relationship.
34. Based on the evidence before it the Tribunal is satisfied the parties have a mutual commitment to a shared life together to the exclusion of all others. The Tribunal finds the parties are in a genuine and continuing relationship and that they live together and not separately and apart on a permanent basis.
35. On the basis of the above the Tribunal is satisfied that the requirements of s.5F(2) are met at the time of the application.
36. The Tribunal finds that at the time of the application the applicant was the spouse of a person who is an Australian citizen, that the applicant was being sponsored by that person and the sponsor was not prohibited from being a sponsoring partner under cl.820.211(2B). The Tribunal finds that at the time the application was lodged, the applicant was the holder of a substantive visa. Accordingly, the Tribunal finds that the applicant meets cl.820.211(2)(a), (c) and (d).

37. The Tribunal finds that the applicant continues to meet the requirements of cl.820.211(2) at the time of this decision. Therefore the applicant satisfies cl.820.221.
38. Given these findings the Tribunal is satisfied that at the time the visa application was made and at the date of this decision the parties were in a spousal relationship.
39. Given the findings above, the appropriate course is to remit the application for the visa to the Minister to consider the remaining criteria for a Subclass 820 visa.

DECISION

40. The Tribunal remits the application for a Partner (Temporary) (Class UK) visa, with the direction that the applicant meets the following criteria for a Subclass 820 (Partner (Temporary)) visa:
 - cl.820.211(2) of Schedule 2 to the Regulations
 - cl.820.221 of Schedule 2 to the Regulations

Michelle East
Member

ATTACHMENT - EXTRACT FROM MIGRATION REGULATIONS 1994

1.15A SPOUSE

(1) For subsection 5F (3) of the Act, this regulation sets out arrangements for the purpose of determining whether 1 or more of the conditions in paragraphs 5F (2) (a), (b), (c) and (d) of the Act exist.

- (2) If the Minister is considering an application for:
- (a) a Partner (Migrant) (Class BC) visa; or
 - (b) a Partner (Provisional) (Class UF) visa; or
 - (c) a Partner (Residence) (Class BS) visa; or
 - (d) a Partner (Temporary) (Class UK) visa;

the Minister must consider all of the circumstances of the relationship, including the matters set out in subregulation (3).

- (3) The matters for subregulation (2) are:
- (a) the financial aspects of the relationship, including:
 - (i) any joint ownership of real estate or other major assets; and
 - (ii) any joint liabilities; and
 - (iii) the extent of any pooling of financial resources, especially in relation to major financial commitments; and
 - (iv) whether one person in the relationship owes any legal obligation in respect of the other; and
 - (v) the basis of any sharing of day to day household expenses; and
 - (b) the nature of the household, including:
 - (i) any joint responsibility for the care and support of children; and
 - (ii) the living arrangements of the persons; and
 - (iii) any sharing of the responsibility for housework; and
 - (c) the social aspects of the relationship, including:
 - (i) whether the persons represent themselves to other people as being married to each other; and
 - (ii) the opinion of the persons' friends and acquaintances about the nature of the relationship; and
 - (iii) any basis on which the persons plan and undertake joint social activities; and
 - (d) the nature of the persons' commitment to each other, including:
 - (i) the duration of the relationship; and
 - (ii) the length of time during which the persons have lived together; and
 - (iii) the degree of companionship and emotional support that the persons draw from each other; and
 - (iv) whether the persons see the relationship as a long term one.
- (4) If the Minister is considering an application for a visa of a class other than a class mentioned in subregulation (2), the Minister may consider any of the circumstances mentioned in subregulation (3).